United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-6062

To be argued by
JOHN S. MARTIN, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

DOCKET NO. 75—6062

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

WILLIAM L. MATHESON, Executor of the Will of Dorothy Gould Burns, Deceased,
Defendant-Appellant.

WILLIAM L. MATHESON, Executor of the Will of Dorothy Gould Burns, Deceased,
Plaintiff-Appellant,

against

UNITED STATES OF AMERICA,
Defendant-Appellee.

B
P/S

BRIEF ON BEHALF OF APPELLANT WILLIAM L. MATHESON

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UNITED STATES OF AMERICA,

Defendant-Appellee.

BRIEF ON BEHALF OF APPELLANT WILLIAM L. MATHESON

Preliminary Statement

William L. Matheson, Executor of the Estate of Dorothy Gould Burns, appeals from an order of the Honorable Kevin T. Duffy entered in the United States District Court

for the Southern District of New York on May 27, 1975 granting summary judgment to the United States in two consolidated actions involving the question whether the deceased was a citizen of the United States and, therefore, liable for federal income and gift taxes for the years 1966-1968. In May, 1973, the United States commenced Civil Action 73 Civ. 2011 against the Executor seeking to recover, with interest, income taxes of $6,948.97 for the year 1966, alleged to have been improperly refunded to the Executor by the Internal Revenue Service on the basis of his claim that the decedent was not a citizen of the United States in 1966. While the Government's action was pending, the Executor commenced action 74 Civ. 2437, seeking to recover, with interest, gift taxes totaling $9,954.17 for the years 1966 through 1968, which were alleged to have been improperly collected from the decedent on the ground that she was a citizen of the United States, although she had lost her American citizenship on December 21, 1944, when she successfully applied for citizenship in the Republic of Mexico, taking an oath of allegiance to that government and renouncing all citizenship foreign to that Republic.

Since the decedent had not resided in the United States since 1919, the central issue presented by both actions was whether the decedent had lost her United States citizenship at the time she became a naturalized citizen of Mexico and was, therefore, not liable for United States gift taxes, and was liable for income taxes only at the rates applicable to nonresident aliens. This same basic issue is presently before the Tax Court of the United States in a proceeding to determine whether the Estate is liable for United States estate taxes. That proceeding has been stayed pending the resolution of this action.

On May 9, 1975 the district court filed an opinion denying the Executor's motion for summary judgment and granting the cross-motion for summary judgment of the

United States. In his opinion Judge Duffy found that despite the fact that her application for Mexican citizenship contained a declaration of allegiance to that government and a renunciation of all protection foreign thereto, the decedent did not have a subjective intent to renounce her United States citizenship and, therefore, she remained a citizen until the time of her death. Alternatively, the district court found that the Estate was estopped from claiming that the decedent lost her citizenship in 1944 because on several occasions after that date, she sought and obtained United States passports. This appeal follows.

Questions Presented

1. Whether, as a matter of law, Mrs. Burns lost her American citizenship when she was granted Mexican citizenship on the basis of an application in which she pledged allegiance to the Republic of Mexico and renounced all protection foreign to that government?

2. If the district court was correct in holding that the question whether Mrs. Burns expatriated herself by applying for Mexican citizenship depends on a determination of whether or not she actually intended to renounce her United States citizenship at that time, was it proper for the district court to resolve this disputed factual question on a motion for summary judgment?

3. Does the fact that Mrs. Burns applied for several United States passports after she obtained Mexican citizenship, estop her Estate from claiming that she expatriated herself by that act, when the Passport Office's determination that she was entitled to a passport was based on its own investigation and the Passport Office was aware of all the facts that it considered material?

Even if *Afroyim* was not overruled *sub silentio* in

Statute Involved

Section 401 of the Nationality Act of 1940 provides:

> SEC. 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> (a) Obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person: *Provided, however,* That nationality shall not be lost as the result of the naturalization of a parent unless and until the child shall have attained the age of twenty-three years without acquiring permanent residence in the United States: *Provided further,* That a person who has acquired foreign nationality through the naturalization of his parent or parents, and who at the same time is a citizen of the United States, shall, if abroad and he has not heretofore expatriated himself as an American citizen by his own voluntary act, be permitted within two years from the effective date of this Act to return to the United States and take up permanent residence therein, and it shall be thereafter deemed that he has elected to be an American citizen. Failure on the part of such person to so return and take up permanent residence in the United States during such period shall be deemed to be a determination on the part of such person to discontinue his status as an American citizen, and such person shall be forever estopped by such failure from thereafter claiming such American citizenship; or
>
> (b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or
>
> (c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws

of the United States, if he has or acquires the nationality of such foreign state; or

(d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible; or

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

(f) Making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(g) Deserting the military or naval service of the United States in time of war, provided he is convicted thereof by a court martial; or

(h) Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction.

Statement of Facts

A. Mrs. Burns' Application for Mexican Citizenship

Dorothy Gould Burns was born in the United States of American parents in 1904. In 1919, she moved with her parents to Europe and she never again established a residence in this country. In 1925, in Switzerland, she married a Swiss nobleman, Baron de Graffenreid, and two daughters were born of this marriage before it terminated by divorce in 1936 (A. 46-47).

On May 24, 1944, in Mexico, the decedent married Archibald Burns who had been born in Mexico of Scottish parents and was therefore a Mexican national. After her

marriage to Burns, she contacted a Mexican attorney, Francisco Liguori and told him "she wanted to obtain her Mexican nationality . . . she intended to reside in Mexico" (A. 101). Since an alien woman who married a Mexican man was entitled to naturalization under Mexican law, Mr. Liguori prepared the requisite petition (A. 95). On December 21, 1944 Mrs. Burns signed a petition in Spanish, which has been translated as follows:

> "To the
> Secretary of Foreign Affairs
> Legal Department
>
> "I, Dorothy Gould Burns, of U.S. nationality, married, with domicile for receipt of services and notices at Office 101, Building 44, Calles de Venustiano Carranza, in this City, respectfully appear and declare:
>
> "That I request that you issue to me a certificate of Mexican nationality, in view of the fact that I have my residence in the territory of the nation, as proven by the enclosed certificate, and that I contracted marriage on May 24th of the present year, as proven by the corresponding certificate, to Mr. Archibaldo Burns, of Mexican nationality, in accordance with the birth certificate which I also submit herewith.
>
> "I herewith formally declare my allegiance, obedience and submission to the laws and authorities of the Republic of Mexico; I expressly renounce all protection foreign to said laws and authorities and any right which treaties or international law grant to foreigners, expressly furthermore agreeing not to invoke with respect to the Government of the Republic any right inherent in my nationality of origin.
>
> "Under oath, I declare that I have no title of nobility to waive, but assuming that, without my knowledge, I should have any such right, I herewith formally waive same whatever its origin.

side in Mexico. As I understand she came from

"I enclose revenue stamps in an amount of Pesos 25.00 ordinary stamps and Pesos 2.50 for the additional 10%, as well as two full face photographs of myself, small size, for the certificate to be issued.

"I furthermore declare that I owe no Federal Income Tax and submit furthermore the documents which I have in my possession from the Department of the Interior.

"In view of the foregoing and pursuant to Subdivision II, of Article 2 of the Nationality and Naturalization Law, I respectfully pray that the Department of Foreign Affairs:

"I. Admit the present request as written, in which I request the issuance of a certificate of Mexican nationality.

"II. Hold that the affirmations and waivers referred to in Articles 17 and 18 of the Nationality and Naturalization Law in force have been duly submitted.

"III. Hold that the annexes mentioned in the body of this instrument as well as the respective photographs and stamps have been duly submitted.

"IV. Declare that Francisco Liguori Jimenez, Esq. has been authorized to receive notifications in my name.

"V. In due time, issue to me the certificate requested.

"Respectfully submitted.

"Mexico, D.F., December 21, 1944

"S/ Dorothy Gould Burns"

(A. 53-55)

As the petition indicates, the oath of allegiance to the Republic of Mexico and the renunciation of nationality of origin contained therein were based upon the provisions of

Article 17 of the Mexican Law of Nationality and Naturalization which prescribed the form of oath required of all those seeking naturalization:

> "Article 17.—The interested party, through the agency of the Judge, shall petition the Ministry for his Certificate of Naturalization, *swearing allegiance, obedience and submission to the Laws and authorities of the Republic, expressly renouncing all protection other than that afforded by said Laws and authorities* and any right granted to aliens by Treaties or International Law, binding himself also, specifically, not to invoke against the Republic any inherent right of his original nationality. . . ." (E.A. 106-107)* (Emphasis added)

Mr. Liguori testified at his deposition that before Mrs. Burns signed the petition for naturalization:

> "I read it out loud before Mr. and Mrs. Burns, making Mrs. Burns aware of the scope and of the reach of her declarations." (A. 95)

Mr. Liguori explained to Mrs. Burns that in signing the petition she was pledging allegiance to the Republic of Mexico and renouncing her allegiance to and any protection from governments other than the Republic of Mexico (A. 97-100). Having been so advised, Mrs. Burns freely and voluntarily signed the petition because she wanted to obtain Mexican nationality and to reside in Mexico (A. 102, 109).

On January 2, 1945, a certificate of Mexican nationality was issued to Mrs. Burns by the Mexican Ministry of Foreign Relations. Thereafter, Mrs. Burns' name was removed

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* References in the form "E.A." are to portions of the two volume statement pursuant to Rule 9(g) filed by the Government, in the court below, which are being printed separately as an Exhibit Appendix.

from the list of aliens maintained by the Ministry of Interior and she was issued a Mexican passport (A. 49, 103). In 1946 Mrs. Burns, who had one daughter from her marriage to Mr. Burns, made application for her oldest daughter, Rolande de Graffenreid to immigrate to Mexico as the daughter of a Mexican national (A. 103-104). Mrs. Burns continued to reside in Mexico until 1953 when she travelled to the south of France, where she resided until her death on July 5, 1969 (A. 49-50).

B. Mrs. Burns' Dealings with the United States Passport Office

At the time she left the United States in 1919, Mrs. Burns possessed a valid United States passport and she did not apply for another United States passport until September 12, 1934 (A. 46-47). On or about September 3, 1934, Mrs. Burns, then the Baroness de Graffenreid de Villars, entered the United States on the basis of an "affidavit in lieu of a passport" issued by the American Consulate in Paris, France. On September 12, 1934, she made an application to the Passport Office for a United States passport. The employee of the Passport Office in New York who interviewed Mrs. Burns stated in forwarding her application to the Passport Office in Washington that: "American citizenship seems to be of little concern to the applicant" (E.A. 1).

In a letter dated September 25, 1935, the Passport Office advised Mrs. Burns that, under the law as it then existed, she had presumptively lost her United States citizenship by virtue of her marriage to Baron de Graffenreid and her extended residence abroad and that, in the absence of proof overcoming the presumption, she could only reacquire her United States citizenship by virtue of a special naturalization proceeding (*Id.* at pp. 4-7). Promptly thereafter, she left the United States without instituting such a proceeding (A. 47).

In May of 1936 Mrs. Burns was divorced from the Baron. On October 6, 1936, she obtained from the American Consul General in Paris, France, another "affidavit in lieu of a passport." Thereafter, she resided in France and elsewhere outside of the United States (*Ibid.*).

Because of the German invasion of France, Mrs. Burns tried to flee Europe in 1940, but made her way only as far as Spain. She attempted to enter Portugal for the purpose of going to the United States or South America, but was turned back from Portugal because of the lack of a passport. (*Ibid.*) She was then briefly incarcerated in Spain for the same reason (R. 29, Defendant's Response to Request for Admissions, Nos. 15-16).

On October 10, 1940, she made application at the American Consulate in Madrid, Spain, for a United States passport and she was given a limited passport for the purpose of passing through Spain and Portugal in transit to the United States on a nonbelligerent vessel. The passport expired on November 30, 1940. She reached the United States in early 1941 and thereafter promptly departed for Cuba, where she met her second husband, Archibald Burns. In March of 1942, she went to Mexico with him (A. 48).

After World War II had ended, Mrs. Burns again travelled to the United States and Europe. After finding the treatment accorded to her while travelling on a Mexican passport to be unsatisfactory and believing that she would receive better treatment if she travelled on an American passport, she made application to the American Consulate in Mexico City for a United States passport on May 2, 1947 (A. 134). In this application she listed her husband's birthplace as Chichuahua, Mexico but stated that he was a British subject. The passport application form also contained in fine print the statement that among other things she never obtained naturalization in a foreign state or had taken an oath or made an affirmation or other

formal declaration of allegiance to a foreign state.* A United States passport was issued to her on May 21, 1947 (E.A. 18-20).

On April 7, 1949, she made an application for a renewal of her passport in which she stated that her husband was a citizen of Mexico. Her passport was extended apparently without question (E.A. 14-15).

On March 30, 1951, she made application for a new passport in which she stated that her husband was a "naturalized Mexican". In forwarding her application to Washington for review, the American Consul in Mexico stated:

> "I have no reason to believe that Mrs. Burns has lost her American citizenship under any of the provisions of the Nationality Act of 1940. However, because of her protracted foreign residence, her tenuous family ties with the United States, her marriage to an alien, and the fact that she is residing in this country as a Mexican citizen, her application is submitted to the Department for a ruling regarding her right to passport facilities for continued residence in this country." (E.A. 24-25).

Since she had made plans for travel to Europe to visit her parents, she was granted a passport for six months. While in Europe, she applied on August 28, 1951, for a further extension of her passport, which was granted (E.A. 26-27).

As a result of an application which she made on May 6, 1952, for a further extension of her United States passport, the Department of State undertook, *sua sponte,* an investigation of Mrs. Burns' Mexican citizenship. The Passport Office was aware that Mrs. Burns had been issued

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* A similar printed statement was contained on all of the subsequent passport applications filed by Mrs. Burns.

a certificate of Mexican nationality (E.A. 58) and that it was the stated policy of the Mexican Ministry of Foreign Relations since at least 1942 not to issue a certificate of Mexican nationality unless an applicant, such as Mrs. Burns, took an oath of allegiance and made a renunciation (A. 80-81). In the communications between the American Embassy in Mexico and the Mexican Department of Foreign Affairs with respect to what actions Mrs. Burns had taken in acquiring Mexican citizenship our Embassy never specifically asked, and the Mexican Department never specifically stated, whether Mrs. Burns had ever executed any document in which she had taken an oath of allegiance to the Republic of Mexico or renounced allegiance to countries other than Mexico (E.A. 36-43).

Because she was then unable to obtain anything but brief extensions of her passport, Mr. Burns asked her counsel, Mr. Matheson, to make inquiry as to the reasons for this. After a preliminary investigation, counsel advised her that the reason for her obtaining only brief extensions was a requirement of law relating to female citizens married to foreigners and living in a foreign state (E.A. 127-128). Thereafter, when it appeared that there would be a delay in obtaining any extension of Mrs. Burns' passport, counsel inquired by telephone twice, and wrote three letters to the Passport Office, to which he received two letters in reply (E.A. 44-51, 55-56, 58-59). He was told in the course of a telephone conversation with a Mr. W. H. Young that the Passport Office "had been looking into the question whether Mrs. Burns had lost her American citizenship through acquisition of Mexican nationality. . . ." (E.A. 44). Subsequently, after receiving a letter from the Passport Office, Mr. Matheson wrote in reply: "I have your letter of March 31st. . . . Although you did not expressly state that you have determined that Mrs. Burns remains a United States

citizen, I infer that to be true" (E.A. 50). Thereafter, the Passport Office extended Mrs. Burns' United States passport, which was continuously reissued or extended from time to time until her death in 1969 (E.A. 57, 67, 69, 71, 75, 77, 78).

C. Mrs. Burns' Payment of United States Income and Gift Taxes and the Applications for Refund

From 1956 on, Mrs. Burns filed United States income tax returns as if she were a citizen of the United States. In this connection she paid approximately $63,000 more in such income taxes than she would have been required to pay if she had filed her returns as a nonresident alien. In addition, she filed United States gift-tax returns for the years 1956 through 1958, 1960 through 1962, and 1964 through 1968, as if she were a United States citizen. As a result she paid approximately $127,000 more in such gift taxes than if she had filed her returns as a nonresident alien (A. 50-51, R. 36, Ex. Q).

Mrs. Burns died on July 5, 1969. The following February her Executor learned for the first time that Mrs. Burns had signed the application for a certificate of Mexican nationality in which she had pledged allegiance to the Republic of Mexico and renounced all citizenship foreign thereto (A. 45, 51).

After obtaining a copy of the application for a certificate of Mexican nationality which Mrs. Burns executed in 1944, the Executor on or about April 14, 1970, filed claims for refund for United States income taxes and gift taxes for the years 1966 through 1968, the only years for which the statute of limitations had not then run (A. 51). In addition, he filed on or about that date a final income-tax return for 1969 on the basis that Mrs. Burns was a nonresident alien and he claimed a refund of overpayment of estimated tax (R. 36, Exhibit B, pp. 3, 7).

The refunds for 1966 and 1969 income taxes were promptly made without audit (A. 51; R. 36, Exhibit P, pp. 3, 7). Thereafter, an office audit was conducted in connection with the claims for refund of gift taxes for the years 1966 through 1968. These claims were disallowed by the District Office, and a protest was taken by the Estate (A. 12-17).

On or before October 5, 1970, the defendant filed a non-resident alien estate-tax return with respect to Mrs. Burns' estate. Between that date and October 5, 1973, an audit was conducted and several issues were raised, including the citizenship of Mrs. Burns at the time of her death, the valuation of her French property and the credit for foreign taxes paid. On or before October 5, 1973, a statutory notice of deficiency was issued to the Estate. On December 10, 1973, the Executor filed his petition in the Tax Court contesting the assessment of the deficiency and moved to stay all proceedings with respect thereto (R. 36, Exhibit A).

In May of 1973 the Government brought this action to recover the 1966 refund which it alleges was erroneously made (A. 4-7). On June 5, 1974, the Executor commenced a civil action in the district court to recover the overpayments of gift taxes for 1966, 1967 and 1968 (A. 12-17).

POINT I

In making an application for Mexican citizenship in which she swore allegiance to Mexico and renounced all other allegience, Mrs. Burns abandoned her United States citizenship.

The basic question presented on this appeal is whether Dorothy Gould Burns lost her American citizenship in late 1944 when she sought and obtained Mexican citizenship. If she did lose her citizenship at that time, then she was not a citizen in the period of 1966-1968 and thus, was not

liable for the gift and income taxes at issue here. It is the position of appellant that in applying for Mexican citizenship, Mrs. Burns voluntarily relinquished her American citizenship in accordance with the express terms of two separate provisions of the Nationality Act of 1940.

Section 401 of the Nationality Act of 1940 provides in relevant part:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> (a) Obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person: * * * or
>
> (b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; * * *." 8 U.S.C.A. § 801, 54 Stat. 1168-1169.

In December, 1944, and January, 1945, respectively, Dorothy Gould Burns sought and obtained naturalization as a Mexican national by filing an application with the Mexican Ministry of Foreign Relations, in which she declared:

> "I herewith formally declare my allegiance, obedience and submission to the laws and authorities of the Republic of Mexico; I expressly renounce all protection foreign to said laws and authorities and any right which treaties or international law grant to foreigners, expressly furthermore agreeing not to invoke with respect to the Government of the Republic any right inherent in my nationality of origin."

By obtaining Mexican nationality and making a formal declaration of allegiance to Mexico, Mrs. Burns performed two acts which, according to the specific decree of Con-

gress, would automatically result in the loss of her United States citizenship, regardless of her subjective intent to renounce that citizenship. As the Supreme Court held in *Savorgnan* v. *United States,* 338 U.S. 491, 499-500 (1950):

> "The acts upon which the statutes expressly condition the consent of our Government to the expatriation of its citizens are stated objectively. There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them.
>
> * * *
>
> "There is nothing . . . that implies a congressional intent that after an American citizen has performed an overt act which spells expatriation under the wording of the statute, he, nevertheless, can preserve for himself a duality of citizenship by showing his intent or understanding to have been contrary to the legal consequences of such an act."

Accord, Revedin v. *Acheson,* 194 F.2d 482 (2d Cir. 1952).

If the above-quoted provisions of the Nationality Act are constitutional, then according to *Savorgnan,* Mrs. Burns expatriated herself whether or not she intended to do so. The district court apparently concluded, however, that in light of *Afroyim* v. *Rusk,* 387 U.S. 253, these provisions may not constitutionally be applied to any citizen unless the evidence establishes that, at the time the acts in question were performed, the citizen actually intended to renounce United States citizenship. The district court decided, as a matter of fact, that Mrs. Burns did not intend to renounce her citizenship at the time she obtained Mexican citizenship and, thus, under *Afroyim,* she never lost her United States citizenship.

We respectfully submit that the district court erred in holding that a subjective intent to renounce citizenship is

a constitutional prerequisite to a finding of loss of nationality under the provisions of the Nationality Act of 1940, here at issue, and that in any event, the court was in error in its factual finding that Mrs. Burns did not manifest the requisite intent to abandon her United States citizenship at the time she obtained her Mexican nationality.

Afroyim v. *Rusk, supra,* was a 5-4 decision of the Supreme Court in 1967 which overruled a 5-4 decision of the same court in *Perez* v. *Brownell,* 356 U.S. 44 (1957). Both *Afroyim* and *Perez* involved the constitutionality of Section 401(e) of the Nationality Act of 1940 which provided that a citizen of this country would lose his citizenship if he voted in a foreign election. In *Perez* the Court held that Congress, pursuant to its powers to regulate the relations of the United States with foreign countries, could make loss of citizenship an automatic consequence of voting in a foreign election. The majority in *Afroyim* held, however, that citizenship was a right guaranteed by the Fourteenth Amendment and Congress did not have the power under the Constitution to strip a person of his citizenship. The Court in *Afroyim* summarized its holding as follows:

> "Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship."
> 387 U.S. at 268.

There is serious reason to question the continuing validity of *Afroyim.* In *Rogers* v. *Bellei,* 401 U.S. 815 (1971) a majority of the Supreme Court refused to extend *Afroyim* to the case of a citizen born outside of the United States of a citizen mother. Mr. Justice Black, the author of *Afroyim,* noted in dissent:

> "Now this Court by a vote of five to four through a simple change in its composition, overrules that decision." *Id.,* at 837.

Even if *Afroyim* was not overruled *sub silentio* in *Rogers* v. *Bellei, supra,* there is little reason to extend the ruling in *Afroyim* to invalidate the different provisions of the Nationality Act of 1940 which are involved here. The basis for loss of citizenship at issue in *Afroyim* and *Perez,* voting in a foreign election, was a ground for loss of nationality unique to the laws of the United States, the invocation of which would often have the undesirable effect of rendering the former citizen stateless. See 387 U.S. at 268; MacDougal, Lasswell and Chen, *The Protection of the Individual in External Areas,* 83 Yale L.J. 900, 937 (1974). The provisions of the 1940 Act at issue here, which make loss of citizenship the result of obtaining foreign citizenship and declaring allegiance to a foreign government, are, however, bases for loss of nationality generally invoked by nations to prevent problems of dual nationality where a person has voluntarily taken on a new allegiance to a foreign government. See Duvall, *Expatriation under United States Law, Perez to Afroyim: The Search For a Philosophy of American Citizenship,* 56 Va.L.Rev. 408, 410 (1970).

The majority opinion in *Afroyim* expressly recognized that American citizenship could be lost if the citizen "voluntarily relinquishes that citizenship." 387 U.S. at 268. While the majority in *Afroyim* did not attempt to enumerate those acts which would constitute a voluntary relinquishment of citizenship, the majority did cite with approval the dissent of Chief Justice Warren in *Perez* which stated:

> "It has been long recognized that citizenship may not only be voluntarily renounced through exercise of the right of expatriation but also by other actions in derogation of undivided allegiance to this country. While the essential qualities of the citizen-state relationship under our Constitution preclude the exercise of governmental power to divest United States citizenship,

the establishment of that relationship did not impair the principle that conduct of a citizen showing a voluntary transfer of allegiance is an abandonment of citizenship. Nearly all sovereignties recognize that acquisition of foreign nationality ordinarily shows a renunciation of citizenship. Nor is this the only act by which the citizen may show a voluntary abandonment of his citizenship. Any action by which he manifests allegiance to a foreign state may be so inconsistent with the retention of citizenship as to result in loss of that status. In recognizing the consequence of such action, the Government is not taking away United States citizenship to implement its general regulatory powers, for, as previously indicated, in my judgment citizenship is immune from divestment under these powers. Rather, the Government is simply giving formal recognition to the inevitable consequence of the citizen's own voluntary surrender of his citizenship."

356 U.S. at 68-69 (Footnotes omitted)

Cases subsequent to *Afroyim* confirm the fact that the making of an express renunciation of citizenship is not the only act which will result in loss of citizenship under *Afroyim*. Thus, in *King* v. *Rogers*, 463 F.2d 1188, 1189 (9th Cir. 1972), the Court stated:

"We assume, without deciding, that specific subjective intent to renounce United States citizenship is required for expatriation. The Secretary may prove this subjective intent by evidence of an explicit renunciation, *Jolley* v. *Immigation and Naturalization Service*, 441 F.2d 1245 (5th Cir. 1971), acts inconsistent with United States citizenship, *Baker* v. *Rusk*, 296 F.Supp. 1244 (C.D., Cal., 1969), or by 'affirmative voluntary act[s] clearly manifesting a decision to accept [foreign] nationality . . .', *In re Balsamo*, 306

F.Supp. 1028, 1033 (N.D., Ill. 1969). Such proof need be only a preponderance of the evidence." U.S.C. § 148(c)." (Footnote omitted).

In acquiring Mexican citizenship, Mrs. Burns performed an act which, as Chief Justice Warren noted, is a generally recognized manifestation of a renunciation of any other citizenship. The deposition testimony of Francisco Liguori, the Mexican attorney who assisted Mrs. Burns in obtaining her Mexican nationality, demonstrates that she voluntarily took these actions to obtain the benefits of Mexican citizenship with a clear understanding that she was transferring her allegiance to the Republic of Mexico.

Liguori testified that shortly after her marriage in Mexico, Mrs. Burns told him that she wanted to obtain a certificate of Mexican nationality (A. 92). Thereafter, Liguori assisted Mrs. Burns in filing a request with the Ministry of Foreign Relations for a certificate of Mexican nationality (A. 95). Liguori prepared the application for citizenship that Mrs. Burns signed and explained to her that in signing the document she was pledging allegiance to the Republic of Mexico, and that she was renouncing her allegiance to and protection from governments other than the Republic of Mexico (A. 98-99). Mr. Liguori's deposition is unequivocal in asserting that Mrs. Burns took these actions with full understanding of their consequences:

> "Q. At the time Mrs. Burns signed the document Deposition Defendant's Exhibit 2, did you have any question in your mind that she understood what she was doing?
>
> Mr. Barkan: I'll note an objection to the question as calling for a conclusion.
>
> A. No, I didn't have any doubts. She wanted to obtain her Mexican nationality as many women who marry Mexicans do. Furthermore, she wanted to re-

side in Mexico. As I understand she came from Lausanne, Switzerland, as I understand it, as I remember.

Q. At the time Mrs. Burns signed this document Deposition Defendant's Exhibit 2, did you have any question in your mind that she was signing this document and taking the step involved in signing this document voluntarily?

Mr. Barkan: Same objection.

A. [illegible] she did it freely. She had asked me together with Mr. Burns to do so, freely."

(A. 101, 109).

No doubt the Government will argue here, as it did below, that Mrs. Burns' actions in applying for Mexican nationality and signing the oath of allegiance were of no significance because she had automatically become a Mexican citizen as a matter of law at the time she married Mr. Burns, and the subsequent application for a certificate of nationality was merely an act consistent with her status as a dual national. On the basis of this factual assertion the Government contended below that under the opinion of the Supreme Court in *Kawakita* v. *United States*, 343 U.S. 717, Mrs. Burns' application for Mexican citizenship would not result in loss of United States citizenship because "the mere fact that [a dual national] asserts the rights of one citizenship does not without more mean that he renounces the other". *Id.*, 343 U.S. at 723.

While it is true that, in a number of cases, various courts have held that the mere taking of an oath of allegiance to the other country of which he is a national by a person having dual citizenship will not result in the loss of United States citizenship, those cases have no relevance here. See *Jalbuena* v. *Dulles*, 254 F.2d 379 (3d Cir. 1958) (man who was born in United States of American mother and Filipino father and who was raised in Philippines, did not lose his American citizenship by tak-

ing an oath of allegiance to the Philippines in order to obtain a Philippine passport); *Peter* v. *Secretary of State,* 347 F. Supp. 1035 (D.D.C. 1972) (American woman who married a Hungarian national held not to have expatriated herself by traveling on a Hungarian passport); *In Re Bautista's Petition,* 183 F. Supp. 271 (D. Guam 1960) (woman born on Guam who married a Philippine citizen did not lose her American nationality by taking an oath of allegience to the Philippines in order to obtain a Philippine passport; *cf. Kawakita* v. *United States,* 343 U.S. 717, 273 (in trial for treason it was a question of fact whether man born in United States of Japanese parents lost his citizenship when he registered as a Japanese citizen in Japan and travelled on a Japanese passport).

The dual nationality cases relied on by the Government, and the court below are clearly distinguishable since none of them involved instances where the oath of allegiance was contained in an application for foreign citizenship. More important, however, the Government's claim that Mrs. Burns was a dual national is premised on an erroneous assertion of Mexican law.

The Government's assertion that Mexican law as it existed in 1944 automatically conferred Mexican citizenship on a woman who married a Mexican national, whether or not she applied for Mexican citizenship, is directly contradicted by an official interpretation of this Mexican law by the Department of Foreign Affairs of Mexico rendered in response to an inquiry from our State Department (A. 58-69). [This document is hereinafter referred to as Mexican Government Memorandum.]

Article 2 of Chapter I of the Mexican law on Nationality and Naturalization provides:

> "*Article 2.*—The following are Mexicans by naturalization:
>
> I.—Aliens who obtain a Naturalization Certificate from the Ministry of Foreign Relations.

> II.—Any alien woman who marries a Mexican and who has or establishes her domicile within the national territory. She retains her Mexican nationality even after dissolution of the marriage tie.
>
> The Ministry of Foreign Relations will issue the corresponding declaration in this case."

Viewing this passage in isolation, the Government argues that on the day of her marriage, Mrs. Burns became a Mexican citizen and the Mexican Ministry of Foreign Relations had no right, prior to issuing her certificate of nationality to require her to apply for citizenship or to renounce her United States citizenship.

The Mexican Government Memorandum demonstrates, however, that this provision may not be considered in isolation and that Mexican law required a woman who married a Mexican national to make an application for citizenship in which she renounced any other nationality. The memorandum notes that on December 26, 1933, the Mexican Government signed the Convention on Nationality at Montevideo and that convention was promulgated as a Mexican domestic law by a decree of March 10, 1936* (A. 64-65). Articles 1 and 6 of the Convention on Nationality are particularly relevant here. They provide:

> "Article I. Naturalization of an individual before the competent authorities of any of the signatory states carries with it the loss of the nationality of origin.
>
> * * *
>
> "Article 6. Neither matrimony nor its dissolution affects the nationality of the husband or wife or their children." VI Hudson, International Legislation 593-596

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* The United States was not a party to this Convention but that fact cannot undercut the impact of this convention on the internal law of Mexico.

Thus, in signing the Convention on Nationality and promulgating it by domestic decree, the Mexican Government recognized that Mexican nationality would not automatically be bestowed on a woman who married a Mexican national and committed itself to the position that its naturalization procedures should involve the loss of any other nationality.

As the Mexican Government memorandum indicates, these rules were promulgated as domestic laws in recognition of the fact "that international law requires the States to seek to prevent dual nationality" (A. 65). *Cf. Savorgnan* v. *United States, supra* at 500 ("The United States has long recognized the general undesirability of dual allegiances"). See generally McDougal, Lasswell & Chen *supra* 83 Yale L.J. at 920-921.*

Even if the Mexican decrees and international convention did not expressly require an alien woman who married a Mexican to make an application for citizenship, under Mexican law, the Department of Foreign Relations had the power to establish procedures to implement the conferring of naturalization which had the force of law. The difference between the laws of Mexico and the laws of the United States in this regard is set forth in the Mexican Government Memorandum:

> "7. With respect to the problem under consideration, it is important to emphasize that the Nationality and Naturalization Law is a regulatory statute of Article 30 of the Constitution. In Mexican law the regulatory statutes establish the manner of complying

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* Although the Government argues here that Mexico could and did automatically confer Mexican nationality on Mrs. Burns, an international claims commission in 1930, ruled invalid a provision of Mexican law conferring Mexican nationality on those who purchased land in Mexico, stating "international law. . . . does not permit the compulsory change of nationality." *In re Rau* [1931-32] Am.Dig. 251 (No. 124) (German-Mexican Mixed Claims commission 1930), cited *Id.*, at 920.

with the constitutional provisions they pertain to, and their principal characteristic is that they cannot in any way modify the provision for which they establish regulations. In the absence of a regulatory law, the competent authorities determine the system of application of the constitutional rule which, by its very nature, is limited to expressing principles or very general provisions without entering into procedural details. Consequently, it can be said that the purpose of regulatory laws is to circumscribe, insofar as is possible or advisable, the discretionary power vested in the authorities to apply or execute the provisions of the Constitution" (A. 63).

Thus, unlike our law, Mexican law gives the executive department authority to prescribe procedures for obtaining rights conferred by the constitution or by statute. In fulfilling its function of implementing the naturalization laws, the Department of Foreign Relations "invariably required the affirmation of allegiance and the renunciation of any nationality other than Mexican in connection with the issuance of Mexican citizenship papers to an alien woman who, because she had married a Mexican, had a right to Mexican citizenship by naturalization; . . ." (A. 63-64).

Thus, Mexican nationality was not automatically conferred on Mrs. Burns at the time of her marriage. In order to obtain that citizenship, it was necessary for her to make an application for citizenship and to swear allegiance to the Republic of Mexico. When she voluntarily applied for that citizenship, she lost her United States citizenship under the express terms of the Nationality Act of 1940. *Savorgnan* v. *United States, supra.*

Moreover, even if our Government is correct in its assertion that under Mexican law the Mexican Ministry of Foreign Relations acted illegally in 1944 when it insisted that alien women who had married Mexican nationals had

to apply for citizenship in order to obtain a certificate of nationality, that error of law by the Mexican Government is not relevant in determining Mrs. Burns' state of mind as evidenced by her voluntary compliance with that administrative procedure. For whether or not Mexican law required such an application, Mrs. Burns believed that it was necessary and by making the application for Mexican citizenship, she evidenced her intention to transfer her allegiance to Mexico and to abandon her United States citizenship. *Perez* v. *Brownell, supra* at 68 (dissent of Chief Justice Warren).

As noted above, the Ministry of Foreign Relations "invariably required the affirmation of allegiance and the renunciation of any other nationality other than Mexican in connection with the issuance of Mexican citizenship papers to an alien woman who . . . had married a Mexican." Thus at the time she signed the petition for a certificate of Mexican nationality, Mrs. Burns believed she was complying with a requirement of Mexican law that she declare her allegiance to Mexico and renounce all other protections. Indeed, the petition which she signed in order to obtain her certificate of nationality concluded:

> "I respectfully pray that the Department of Foreign Affairs:
>
> I. Admit the present request as written, in which I request the issuance of a certificate of Mexican nationality.
>
> II. Hold that the affirmations and waivers referred to in Article 17 and 18 of the Mexican Nationality Laws in force have been duly submitted."

Article 17, which Mrs. Burns asked the Ministry to find she had satisfied provides:

> *Article 17.*—The interested party, through the agency of the Judge, shall petition the Ministry for his Cer-

> tificate of Naturalization, swearing allegiance, obedience and submission to the Laws and authorities of the Republic, *expressly renouncing all protection other than that afforded by said Laws and authorities* and any right granted to aliens by Treaties or International Law, binding himself also, specifically, not to invoke against the Republic any inherent right of his original nationality. . . .'' (E.A. 106-107) (Emphasis added)

Thus, in her petition, Mrs. Burns specifically asked the Ministry of Foreign Relations to find that she had complied with a requirement of Mexican law that she expressly swear allegiance to Mexico and renounce "all protection other than that afforded" by that government.

There can be no question that Mrs. Burns understood what she was doing at the time she signed the petition. Mr. Liguori testified at his deposition that Mrs. Burns asked him to prepare the necessary papers because "she wanted to obtain her Mexican nationality" and that before Mrs. Burns signed this document, "I read it out loud before Mr. and Mrs. Burns, making Mrs. Burns aware of the scope and of the reach of her declaration" (A. 95, 101).

Thus, even if the Ministry of Foreign Affairs did not have the power to require Mrs. Burns to make the oath of allegiance and the renunciation prescribed by Article 17, which was required of all other persons seeking Mexican naturalization, the record demonstrates that Mrs. Burns believed that she was required to do so and, in order to obtain her Mexican citizenship, she willingly pledged allegiance to the Republic of Mexico and renounced all other allegiance.

On this record, there can be little question that Mrs. Burns understood that she was taking on a new allegiance to the Government of Mexico. Thus, under *Savorgnan* v. *United States, supra* and the principles enunciated by

Chief Justice Warren in *Perez,* her actions constituted an abandonment of her United States citizenship regardless of her subjective intent.

But even if the district court was correct in holding that under *Afroyim* her application for Mexican citizenship would not result in Mrs. Burns' expatriation unless she actually intended to renounce United States citizenship, the record contradicts the district court's factual finding that she lacked this subjective intent.

Mrs. Burns had not resided in the United States since 1919. A United States Passport Office employee who interviewed her in 1934 noted that her "American citizenship seems to be of little concern to [her]". In 1944 she was living in Mexico with her husband, who was a Mexican national. She told Mr. Liguori that she wanted to obtain Mexican nationality and she wanted to reside in Mexico. Before she signed the petition, which included the renunciation of foreign nationality required of all foreigners seeking naturalization in Mexico, Mr. Liguori explained to her that she was thereby pledging allegiance to Mexico and renouncing her allegiance to any other government.

All of these facts clearly support a finding that at the time she signed the petition seeking Mexican nationality, Mrs. Burns knew she was renouncing her United States citizenship. Once that citizenship was renounced, the only way she could again obtain American citizenship was by applying for naturalization in the United States. Since she never did apply for naturalization, neither the fact that she later successfully applied for United States passports nor the fact that she unnecessarily paid over $190,000 of United States income and gift taxes, could restore her United States citizenship to her. Thus, as a matter of law she was not a citizen in the period 1966-1968 and the Executor was entitled to the refund of the taxes which were the subject of these two actions.

POINT II

Since both parties stated that Mrs. Burns' intent to renounce her United States citizenship was a disputed issue of fact, summary judgment should not have been granted.

As the district court viewed the case, the question whether Mrs. Burns expatriated herself in applying for Mexican nationality depended upon whether or not she in fact intended to renounce her United States citizenship. The 9(g) statements of both the United States and the Executor said that the question of Mrs. Burns' intent to renounce her United States citizenship was a disputed issue of fact (E.A. 101; A. 82). Since Rule 56(c) *Fed.R.Civ.P.* provides for summary judgment only if the moving party establishes "that there is no genuine issue as to any material fact," the district court erred in granting summary judgment to the United States.

As this court observed only recently in *Rhoads* v. *McFerran,* 517 F.2d 66, 67-68 (2d Cir. 1975):

> It is well settled in this Circuit that, even though both sides have cross-moved for summary judgment, neither motion may be granted unless one party is entitled to it as a matter of law upon genuinely undisputed facts. *American Manufacturers Mutual Ins. Co.* v. *American Broadcasting-Paramount Theatres, Inc.,* 388 F.2d 272, 279 (2d Cir. 1967), *cert. denied,* 404 U.S. 1063 (1972); *Walling* v. *Richmond Screw Anchor Co.,* 154 F.2d 780, 784 (2d Cir.), *cert. denied,* 328 U.S. 870 (1946); *Steinberg* v. *Adams,* 90 F. Supp. 604, 608 (S.D.N.Y. 1950). Furthermore, all reasonable inferences of fact must be drawn in favor of the party opposing summary judgment. *United States* v. *Diebold,* 369 U.S. 654 (1962) (*per curiam*); *Empire Electronics Co.* v. *United States,* 311 F.2d 175, 179-81 (2d Cir. 1962).

The opinion of the district court is replete with references that indicate that in deciding this summary judgment motion, the court was resolving disputed facts and choosing among conflicting inferences from uncontested facts. For example, the court states, "It becomes, then, crucial to look to Mrs. Burns intent in executing the application for a certificate of nationality." (A. 35). In attempting to resolve this factual issue of intent, the court finds as a fact, "Mrs. Burns must have understood that the words in the oath as discussed above, contained no renunciation of her United States citizenship" (A. 37). Having made that factual finding, the court rejects the deposition evidence offered by the Executor. "The oath itself overcomes the ambiguous testimony of Francisco Liguori" (*Ibid.*).

In deciding these issues of fact on a summary judgment motion, the district court violated the

> "maxim that the court on a motion for summary judgment can not *try* issues of fact but can only determine whether there are issues of fact to be tried; and once having determined this affirmatively must leave those issues for determination at trial." *Empire Electronics* v. *United States,* 311 F.2d 175 (2d Cir. 1962) (Emphasis in original) *Jerome H. Lemelson* v. *Ideal Toy Corp.,* 408 F.2d 860 (2d Cir. 1969).

The decision of the court in *Empire Electronics* is particularly relevant here, because there the court reversed a grant of summary judgment even though "the so-called evidentiary facts—the underlying physical data—are not in dispute, but the inferences of fact to be drawn from them are disputed." 311 F.2d at 179. In that case, the court noted that summary judgment was particularly inappropriate "when the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions." 311 F.2d at 180. *Ac-*

cord Cali v. *Eastern Airlines, Inc.*, 442 F.2d 65, 71 (2d Cir. 1971); *White Motor Co.* v. *United States*, 372 U.S. 253, 259; *Poller* v. *Columbia Broadcasting System Inc.*, 368 U.S. 464, 473.* Since the district court determined, and the Government agreed, that Mrs Burns' intent was the crucial issue here, the existence of that factual issue precluded the granting of summary judgment.

Summary judgment was particularly inappropriate here, since the district court's factual determination that Mrs. Burns lacked a subjective intent to renounce her citizenship makes it necessary to decide the constitutional question whether Congress can make loss of citizenship an automatic consequence of the act of applying for foreign nationality without regard to the citizen's subjective intent. Where constitutional issues are involved, the courts have been reluctant to decide crucial factual issues on a motion for summary judgment. See *Perry* v. *Sinderman*, 408 U.S. 593, 598, *Tanaka* v. *I.N.S.*, 346 F.2d 438, 447 (2d Cir. 1965) (Kaufman, J. dissenting); cf. *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-57 (1948).

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* The above cases demonstrate the error in the Government's suggestion in its 9(g) statement that the issue of fact as to Mrs. Burns' intent was ripe for resolution on a summary judgment motion because Mrs. Burns "is dead and cannot presently testify as to her intent, [and] the resolution of that question is now largely dependent upon documentary evidence" (E.A. 101). In *Empire Electronics* the court noted

> "It is true that the actual occurrences recorded in the affidavits of both parties are indeed undisputed, but it does not necessarily follow that there is 'no genuine issue as to any material fact.'"

POINT III

Under the circumstances of this case the Court's finding of estoppel was erroneous.

The record below establishes that beginning in 1947 Mrs. Burns indicated on a series of passport applications that she was a citizen of the United States and that she filed United States tax returns as a citizen for the period from 1956 to her death. The District Court found that this conduct estopped the decedent's Executor from asserting the position that Mrs. Burns was not an American citizen. This finding was contrary to the law of this Circuit.

The facts as presented to the Court below are explicable solely under one of two theories: either Mrs. Burns honestly but erroneously believed that she was a United States citizen, or she deliberately misstated the facts in order to avail herself of the better treatment she received while travelling on a United States passport. Under either of these theories, however, Mrs. Burns' executor should not be estopped from asserting valid claims against the Government.

A. A Finding of Estoppel is Not Warranted Where the Party Against Whom Estoppel is Being Asserted Acted Under An Innocent Misapprehension of the Law

The theory that Mrs. Burns honestly believed that she was a United States citizen, even though she had lost her citizenship, is totally consistent with the teaching of *Savorgnan* v. *United States, supra,* that the mere voluntary performance of an act declared to be expatriating by Congress results in the loss of citizenship regardless of the subjective intent of the individual involved. See also *Perez* v. *Brownell, supra.*

Such an erroneous assumption on the part of a noncitizen would, of course, not estop the Government from contesting the alien's citizenship. Compare *United States* v. *Watkins,*

165 F.2d 1017 (2d Cir. 1948). Conversely, a misapprehension of the law relating to her citizenship by Mrs. Burns should not estop her Executor from asserting her true citizenship as against the Government.

In closely analogous cases this Court has repudiated the application of a theory of estoppel to prevent the assertion of valid claims. In such instances this Court has permitted a taxpayer whose earlier conduct was based on an innocent mistake of law to rectify his prior misapprehension of the law and to advance an apparently inconsistent position at a later date. See *Salvage* v. *Commissioner*, 76 F.2d 112 (2d Cir. 1935), *aff'd sub nom. Helvering* v. *Salvage*, 297 U.S. 106 (1936); *Commissioner* v. *Union Pac.R.Co.*, 86 F.2d 637 (2d Cir. 1936); *Helvering* v. *Schine Chain Theatres*, 121 F.2d 948 (2d Cir. 1941); *Helvering* v. *Brooklyn City R.Co.*, 72 F.2d 274 (2d Cir. 1934) (Hand, J.); *Bennet* v. *Helvering*, 137 F.2d 537 (2d Cir. 1943). See also *Ross* v. *Commissioner*, 169 F.2d 483, 496 (1st Cir. 1948) (Frankfurter, J.); *United States* v. *Albertson Co.*, 219 F.2d 920 (9th Cir. 1955); *Helvering* v. *Williams*, 97 F.2d 810, 812 (8th Cir. 1938).

These cases establish that, if Mrs. Burns' filing of a tax return as a United States citizen was made under a misapprehension of the law as to her true citizenship—a misapprehension shared by the State Department, her Executor's attempt to rectify the situation by asserting her true citizenship was proper even though inconsistent with Mrs. Burns' earlier statement.

B. Since the Government Failed to Establish Detrimental Reliance on Mrs. Burns' Statement, It Cannot Assert A Defense of Estoppel

Even if Mrs. Burns knew that she was not a citizen when she applied for United States passports, no estoppel can be predicated on this conduct since the Government

failed to prove that it relied, to its detriment, upon the conduct of Mrs. Burns.*

The principle that a "party seeking to invoke the doctrine of equitable estoppel must show that he has been prejudiced by his reliance on the conduct of the party sought to be estopped" has been consistently recognized in this Circuit. See, e.g., *United States* v. *Franchi Bros. Cont. Corp.*, 378 F.2d 134, 138 (2d Cir. 1967). In fact, in *Helvering* v. *Schine Chain Theatres, supra,* 121 F.2d at 950, Judge Learned Hand enunciated it as one of the bedrock elements of estoppel:

> ". . . there was no basis for an 'estoppel', however, broadly one uses that disastrous word. This is true because, however nebulous, it has always had at least this solid centre; that the party who invokes it shall have acted to his detriment in reliance upon what the other party has done."

The facts of this case demonstrate that the Government did not prove any reliance, let alone detrimental reliance, on the passport applications of Mrs. Burns. When it conducted its investigation of Mrs. Burns' status in 1953, the Passport Office was aware Mrs. Burns had obtained Mexican nationality and that as a matter of course, the Mexican Ministry of Foreign Relations would not issue a certificate of nationality unless the applicant filed an oath of allegiance and a renunciation of all other allegiances. See p. 12, *supra.*

Indeed, one State Department memorandum says:

> "In 1953, it was determined by the Department that Mrs. Burns did not lose her United States citizenship by acquiring Mexican nationality upon her marriage

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* It is well settled that the one asserting estoppel has the burden of proving all of the necessary elements. See, e.g., *Commissioner* v. *Union Mutual Life Ins. Co.*, 86 F.2d 637, 640 (2d Cir. 1936).

> to Mr. Burns, nor by her taking of the declaration of allegiance to Mexico and renunciation of prior nationality." (E.A. 89)

While other State Department documents contain contrary assertions as to the Department's knowledge of the specific declaration of allegiance and renunciation of prior nationality filed by Mrs. Burns, that fact was characterized as "immaterial" by the Passport Office (E.A. 84).

The fact that the Government had available to it all of the facts it considered material negates any finding of detriment or reliance on the Government's part. See *Helvering* v. *Schine Chain Theatres, supra,* 121 F.2d at 950; *Commissioner* v. *Union Pacific R. Co., supra,* 72 F.2d at 276; see also *Hull* v. *Commissioner,* 87 F.2d 260, 262 (4th Cir. 1937); *Commissioner* v. *Mellon,* 184 F.2d 157, 159 (3d Cir. 1950); *Bealle* v. *Nyden's Inc.,* 245 F.Supp. 86, 94 (D. Conn. 1965). Moreover, where, as here, the Government has conducted an independent investigation of the facts, the absence of detrimental reliance is all the more patent. See, e.g., *Helvering* v. *Schine Chain Theatres, supra,* 121 F.2d at 950.

Thus, the District Court's determination that Mrs. Burns' Executor was equitably estopped from asserting her true citizenship was erroneous.

Conclusion

The judgment of the district court granting summary judgment to the United States should be reversed. If the Court agrees with our contention that the decision of the Supreme Court in *Savorgnan* v. *United States,* 338 U.S. 491, is still good law and under the Nationality Act of 1940 Mrs. Burns automatically lost her United States citizenship when she applied for Mexican citizenship, regardless of her subjective intent, then the district court should be directed

to enter an order granting summary judgment to the Executor. If the Court concludes that the issue of Mrs. Burns' loss of United States citizenship depends on a resolution of the factual question whether she intended to renounce her United States citizenship at the time she sought nationalization in Mexico, then the district court should be directed to conduct a trial on that issue.

Respectfully submitted,

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Due and timely service of TWO copies
of the within BRIEF is hereby
admitted this 1ST day of DECEMBER 1975

.....
Attorney for APPELLEE

Thomas J. Cahill (-pkf)
COPY RECEIVED
December 1st, 1975
UNITED STATES ATTORNEY